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in reference to his debt, if, upon obtaining information that the bark upon which he held a mortgage had been carried to Valparaiso, he had not assented to take the offered remittance. No one can affirm that he would not have attempted to obtain security from other sources, if he had not placed reliance upon that; and his forbearance from all effort to protect his interest was in itself a change from the condition in which he then stood, and to which, being passed, he can of course never be restored.

The court being upon the agreed facts of opinion, for the reasons stated, that this action cannot be maintained, judgment is to be entered for the defendants.

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*In the Carroll Common Pleas of Indiana.*

BARNES vs. ALLEN ET AL.

1. Under the Indiana statute of Distributions, the word "natural" is to be understood and interpreted as meaning legitimate.
2. Under that statute the adoption of an heir confers upon him the right of inheritance in the same manner as if he were a legitimate heir.
3. Where a wife has received from her husband, during his life-time, certain real estate not in lieu of a provision by will or of dower, but absolutely, such gift is not to be regarded in the light of an advancement either at the common law or under the Indiana statute.

Application for partition.

The opinion of the Court was delivered by

PERKINS, J.<sup>1</sup>—The facts of the case are these: Hiram Allen, Esq., of Carroll county, Indiana, departed this life on the 17th day of June, 1859, leaving a large estate, consisting of real and personal property, and a widow, Margaret M. Allen, who had

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<sup>1</sup> The act of February 10th, 1853, (1 R. S. Ed. 1861, page 293, *note*,) provides "That the real and personal estate of any man dying intestate, *without heirs resident in any of the United States*, or legitimate children without the United States,

been his third wife, and had not borne him a child. He also left one illegitimate son, Hiram Allen, Jr., and one adopted son, William Allen, and an adopted daughter, Kate Allen.

He left no legitimate children, or descendents of such. He had disposed of his property, by will, as follows:

“2. As to what property I may die possessed of, I direct that it shall be disposed of thus: My funeral expenses and all my just debts must be paid out of my personal estate, provided it be sufficient for that purpose; and, to enable my executor to pay said debts, I direct that he sell at public sale all my personal property, except such as he shall think best to sell at private sale. I hereby authorize him to sell, and the proceeds of such sales of personal property, together with all the debts due me which he can collect, shall be applied to payment of my debts, which I think will be fully sufficient to pay the same; but if it should not, then I direct my executor to sell my mill property at Lockport. After all my debts are fully paid, then I direct that my said executor sell my said mill property at Lockport, as soon as he can obtain something like a fair price for it; and I hereby empower my executor to sell all my property, personal and real, except the farm on which I live, on showing to the court a necessity therefor, and giving security; but he shall first sell the personal property, and collect debts due me, then sell the mill property at Lockport, then the town property at Delphi, then at West Delphi, then at Pittsburg and Greencastle.

“3. The balance of my property, after paying debts, shall be disposed of as follows, both real and personal, (except the portion which the law gives to my beloved wife,) viz., it shall be divided equally between my three children, Hiram Allen, Jr., (whom I

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shall descend to and be vested in his illegitimate child or children who are residents of this State or any other of the United States, and such illegitimate children shall be deemed and taken to be the heir or heirs of such intestate, in the same manner, and entitled to take by distribution to the same effect and extent as if such child or children had been legitimate: *Provided*, That such intestate shall have acknowledged such child or children, during his life-time, as his own.”

have educated and recognized as my own son, and do hereby acknowledge to be my son,) and William Allen and Kate Allen, my two adopted children, whom I hereby acknowledge and recognize as my children.

"I hereby appoint my beloved wife, Margaret M. Allen, the guardian of the persons and property of my two children, William Allen and Kate Allen; and I hereby appoint my said son, Hiram Allen, Jr., my executor. I further direct that in the final adjustment of the property between my three children, my son Hiram shall be charged with the sum of \$1,000 already advanced to him, unless, before my death, I should equally advance my other two children.

"4. I further direct that on the death of either of my above children, without children living, the share of such child shall go to the survivors or survivor."

The widow, Margaret M. Allen, elected to take under the law, if any provision was made for her by the will.

In 1860 she intermarried with William A. Barnes, with whom she now joins in an application for the partition of the real estate of her former husband, Hiram Allen, deceased, claiming one-third thereof in fee. By the answers of the defendants, admitted by demurrers to be true, it appears that Hiram Allen, deceased, in his life-time, had caused to be conveyed to his wife Margaret, the now female plaintiff, as an intended advancement or jointure, real estate of the value of 5,000 dollars, which she enjoys as her property; and it is claimed that this real estate should be treated as an advancement, or as a jointure. It further appears that the estate of said Hiram, deceased, is indebted in the sum of \$35,000, upon judgments, mortgages, and simple contracts. It is claimed that the widow must contribute to the payment of these debts.

It has already appeared in our statement that William and Kate, two of the devisees, were adopted children of Hiram Allen, the deviser. It has also appeared that Margaret, the female plaintiff, now claiming one-third of Allen's lands in fee, was his third wife, was childless, and has, since his death, married a second husband. Our law of descents provides that "if a widow shall

marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate; and if during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be: 1 R. S., p. 250, sec. 18.

And further, "that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which at his death descends to such wife, shall at her death descend to his children." *Id.* p. 251, sec. 24.

Now, Allen, the former husband of the female plaintiff, left no child or children begotten upon the body of a former wife; and if he had left no adopted children, it would be clear that the share of the female plaintiff in his real estate would vest in absolute fee. Does the existence of the adopted children place the right of inheritance of the wife within the statute above quoted?

Our statute of adoption enacts that any person may adopt, and that the adopted child shall "be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother." Acts 1855, p. 122.

It is competent for the legislature to increase or diminish the inchoate interest of the wife in the estate of her husband, or of an heir apparent in the estate of the ancestor: *Noel vs. Ewing*, 9 Ind. 37.

The female plaintiff, therefore, cannot legally complain should it turn out that the adoption of children by Allen, her husband, resulted in the diminution of her inheritance. Is such the fact? The statute declares that adopted shall have all the rights of "natural" children. In what sense is the word "natural" here used? We think in the sense of *legitimate*, and for these reasons:

1. It would be undignified in a legislature to provide for the adoption of children into the condition of bastardy.

2. The word "natural" is no where used in our statutes to designate

illegitimate children; but the words bastard and illegitimate are employed for that purpose.

3. The word is used in a statute providing an artificial mode of creating heirs, and is designed to contrast in the mind, the legal, natural mode of creating them with the artificial.

4. Adoption of heirs is not of common law origin. It was practiced among most of the ancient nations, and we have borrowed it from the civil law. In that law it gave the right of inheritance of a natural heir, which meant a legitimate heir. Bouvier, in his dictionary, tit. "Natural Children," says, "in the language of the civil law, natural are distinguished from adopted children, that is, they are the children of the parents spoken of, by natural procreation. See Inst. lib. 3, tit. 1, sec. 2." See as to the practice among the Jews, the Bible. See as to adoption in the civil law, 3 Grote's Greece, p. 139, note. Adams' Rom. Antiq. tit. Adoption. Bouvier Dic. h. t.

And it may be observed that the time of adoption will, under our law, affect the interest of adopted children in the estate of the adopted parents. If they be adopted at a time when the adopted father has no wife, and he marry afterwards, they may stand as children of a former wife; otherwise as to a wife existing at the time of adoption; so it may be further observed that by the common law, statute, not nature, designates heirs, though statutes may seek to follow nature. Blackstone, book 2, p. 201, says: "An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor. Our conclusion then, is, that the adopted children in this case have all the rights in the estate of their adopted father that would have belonged to them had they been children begotten upon the body of his wife, that is to say, the woman who was his wife at the time of the adoption of the children. As the adopted children of the husband, they would not be heirs of the separate property of the wife, but they would be of the property of the husband. Had they been adopted as the children of the wife, by her alone, they might have inherited her separate property (that is if a wife could adopt) not that of her husband. Perhaps, if they had been jointly adopted by both husband

and wife, they might have inherited the separate property of each.

It follows, from what has been said, that as the children took, under the will, all that might have been inherited, and the female plaintiff took only what fell to her under the law, her right must be determined by the statute above quoted.

What the extent of the statute may be, in different contingencies, it is not necessary now to determine. Is it an absolute fee till the subsequent marriage, then a life estate during the continuance of such marriage, then an absolute fee again after the death of the husband of such marriage, the wife surviving? Was this the intention of the Legislature? Ought such to be the law? See *Blackleach vs. Harvey*, 14 Ind., 564.

We next inquire whether Allen's widow is bound to account, in the adjustment of the estate, for the \$5,000 worth of property received from her husband in his life-time.

That property does not constitute a provision by will in bar of dower, for the will says nothing about it. It is an advancement; but is it such an advancement as is required to be brought into hotchpot?

If so, it is because the common law or our own statute makes it such.

It is not such by the common law. Blackstone says, Book 2, p. 189: "No lands but such as are given in frank marriage shall be brought into hotchpot;" but lands given in frank marriage "are defined to be, where tenements are given by one man, together with a wife who is the daughter or cousin of the donor, to hold in frank marriage." *Id.* 115.

The lands in the case at bar are not such.

Our statute does not distinguish lands that must be brought into hotchpot by this origin of title; but it does, as does the common law, confine this obligation within limits as to persons. By the common law, it exists only between female heirs, they only taking the estate in common by descent. Here it exists between heirs regardless of sex. Our statute has abolished dower, the estate taken by the wife, at common law, not as heir, but as wife, and

substituted a fee simple, which the wife takes by descent as heir of her husband, and independent of his power to prevent it; but it has not, in terms, required her to bring advancements into hotchpot. It thus subjects children only to this liability. This may be a legislative oversight, but such is the statute. It enacts that "advancements in real or personal property shall be charged against the child or descendants of the child to whom the advancement is made;" but goes no further. Perhaps the Supreme Court, governed by the reason rather than by the letter of the law, should place the widow on the footing of a child in this behalf; but, sitting at *nisi prius*, the writer does not feel disposed to thus rule now. 1 R. S. p. 250, sec. 12. See as to the estate being cast by the law upon the wife by descent, which, as we have seen above, fills the definition of the term "heir;" secs. 17, 22, and following pp. 250, 251, 1 R. S.

See, as to advancements, that is, gifts to a wife, instead of estates in trust, as against the person making them and creditors, but not necessarily to be brought into hotchpot. Matthews on Presumptive Evidence, p. 55, *et seq.*, ed. of 1830; 2 Story Eq. p. 612, *et seq.*

May the conveyance of the property in question to the wife be shown by parol to be a provision for her in the nature of jointure? Our statute provides for two descriptions of jointure.

1. Pecuniary provisions made for and with the consent of an intended wife or husband. In this class, the consent of the intended wife or husband must appear in writing. 1 R. S. p. 254, sec. 37.

2. Those made for the wife before coverture, without her assent, and those made after coverture. *Id.* sec. 40.

In this class, there must be an election to take, by the wife, within a year after the death of her husband, which election might probably be evidenced by her declarations, and possession and enjoyment of the provision, after the expiration of the year mentioned, made for her as a jointure: Washburn on Real Property, vol. 1, p. 273, as the statute does not express how it shall be shown. And, it may be observed, if the provision is held a jointure, it is a bar to any and all inheritance; if an advancement, it is, if less than a full share, a bar, *pro-tanto* only. 1 R. S. p. 250.

In this class, we think, also, the fact that the provision was intended by the husband as in the nature of a jointure, may be shown by parol. The statute does not say, as in case of a will, and of a jointure with consent at the time, that it must appear by the writing.

It has been held that in contracts within the statute of frauds, consideration may be shown by parol. *Gregory vs. Logan*, 7 Blackf. 112. See *Rockhill vs. Spraggs*, 9 Ind. 30. So, as to whether a given conveyance was intended to be by way of advancement. *Shaw vs. Kent*, 11 Ind. 80.

The case at bar falls within the class under consideration.

On the last point, viz : whether the widow, in case she establishes her right to a portion of the inheritance of which Allen died seized, must contribute to payment of incumbrances, no decision will now be made, as the question does not necessarily arise in the partition suit. We may observe, that at common law, she would have been bound to contribute to discharge the liens. *Whitehead vs. Cummins*, 2 Ind. 58. Whether our statute has made a change, is the question. The demurrer to the second paragraph of the answer of the defendants is overruled on the defendant's striking out the words *pro-tanto* therein, and so is that to the second paragraph of the answer of William and Kate Allen ; and those to the others are sustained.

*Schermehorn, Huff, and Jones*, for plaintiffs.

*Pratt and Baldwin*, for defendants.

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*In the Supreme Court of Michigan.—July Term, 1861.*

ALPHEUS G. SMITH AND OTHERS vs. ISAAC C. KENDALL.<sup>1</sup>

An instrument by which the makers promise to pay, to the order of the payees, at a time and place named, a specific sum of money, *with current exchange on New York*, is a negotiable promissory note.—CAMPBELL, J., *dissenting*.

Error to Kent Circuit. The principal question in the case was, whether Kendall, the plaintiff (below), as endorsee of the following instrument, was entitled to treat it as a promissory note, and bring suit thereon in his own name :

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<sup>1</sup> We are indebted to T. M. Cerley, Esq., the learned State Reporter, for the sheets of this case.—Eds. AM. L. REG.